82-568

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Supreme Court Case Number:

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IN THE SUPREME COURT OF THE UNITED STATES

_____TERM

Paul W. Cousino

v.

Commissioner of Internal Revenue

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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(The motion for rehearing dealt with the question presented herein, since both previous opinions were silent on the issue.)

PETITION FOR A WRIT OF CERTIORARI

QUESTION FOR REVIEW:

Can IRS and the Court's enforce regulations which have been withdrawn and which are un-funded?

STATEMENT OF THE CASE:

In a controversy centering around the use of a home office by an educator, and his desire to deduct such expense from his income taxes, IRS issued a statutory notice of deficiency in the amount of $509.00.

During the extensive briefing of this matter, IRS admitted that the regulations under which IRS proceeded against the tax-payer (IRS regulations against claiming such a home office), "have been withdrawn by the Commissioner pursuant to an agreement with Congress".

It is the position of the tax-payer that IRS is proceeding against the tax-payer under a non-existent set of regulations, and is expending funds for an activity unfunded by Congress.

IRS claims that, although the entire set of regulations was withdrawn, it was done for some reason other than to prevent the present activities of IRS. There has never been an adequate explanation of what that other reason may be.

(If it was the intent of Congress to withdraw only part of the regulations through agreement with the Commissioner, then only part of the regulations would have been withdrawn. Yet, the government admits that they have all been withdrawn.)

REASONS FOR THE WRIT:

The Constitution of the U.S., Article I, section 9, clause 7, states that, "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."

Congress, IRS admits, has not appropriated funds to enforce these

non-existent regulations.

The U.S. Constitution, Article II, section 3, states, in connection with the President, that "he shall take Care that Laws be faithfully executed". Appropriations arrangements are not excluded from this constitutional mandate.

In fact, the 6th Circuit has held, at Cincinnati Soap Co. v. U.S., 301 US 308, 1937, that this provision was intended as a restriction upon the disbursing authority of the Executive Dept. And, the 3rd Circuit held, at Moyer v. Brownell, 137 F Supp 594, 1956, that the Presidential responsibility to see to it that the laws are faithfully executed extends to IRS.

The U.S. Supreme Court held at Reeside v. Walker, 52 US 272, 291, 1850, that "No officer, however high, not even the President, much less a Secretary of the Treasury or Treasurer, is empowered to pay debts of the United States generally, when presented to them."

The mis-application of funds (to enforce non-existent regulations) cannot be condoned by the Courts. At National

Association of Regional Councils v. Costle, 564 F2d 583, 1977, it was held that equity empowers the courts to prevent termination of budget authority which exists but; if that authority does not exist, either because it was never provided or because it has been terminated, the Constitution prohibits the courts from creating it no matter how compelling the equities may be. At Spaulding v. Douglas Aircraft Co., 60 F Supp 985, 1945, it was held that the purpose of appropriations, and the terms under which they are made, is a matter solely in the hands of Congress, and it is explicitly the duty of the executive branch (including IRS) to comply therewith, and any attempt by the judicial branch to interfere therewith would be a plain invasion of the constitutional powers of Congress.

See also, Mathews v. De Castro, 429 US 181, 185, 1976, which stated that, "Government decisions to spend money ... are not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of

judgment." And see, Commissioner of Internal Revenue v. Dodd, 410 F2d 132, 133, 1969, which held that, "Congress has delegated to the Commissioner the responsibility of making rules and regulations necessary to effectuate and enforce the tax laws. Modification or change of these rules and regulations must be made by the Congress and the Commissioner, not by the Courts."

Also, please note, Marchetti v. U.S., 390 US 39, 58, 1968, which held that, "The Constitution of course obliges this Court to give full recognition to the taxing powers and to measures reasonably incidental to their exercise. But we are equally obliged to give full effect to the constitutional restrictions which attend the exercise of those powers." And, note, Haynes v. U.S., 390 US 85, 1968, which stated that, "We do not doubt, as we have repeatedly indicated, that this Court must give deference to Congress' taxing powers, and to measures reasonably incidental to their exercise, but we are no less

obliged to heed the limitations placed upon those powers by the Constitution's other commands."

At U.S. v. Correll, 389 US 299, 307, 1967, in holding that it is the province of Congress and the Commissioner, not the courts, to determine the rules and regulations affecting taxation, the Court stated that, "The role of the judiciary in cases of this sort begins and ends with assuring that the Commissioner's rugulations fall within his authority to implement the Congressional mandate in some reasonable manner,"

Congress and the Commissioner have, by agreement, withdrawn the relevant regulations. Yet, in this instance, IRS has selected a tax-payer and proceeded to violate that mandate by expending unappropriated money to enforce non-existent regulations. This is clearly an unacceptable constitutional violation. The Courts cannot condone this violation.

The government is proceeding without a valid legal basis.

The regulations which permit the government to dis-allow a tax exemption under these circumstances have been withdrawn. The government has no authority to make such a disallowance.

It falls to this Court to reverse the decisions below, and further, to order IRS not to further expend money enforcing regulations which have been withdrawn.

Respectfully submitted,

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in propria persona
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JURISDICTION:

Tax Court Jurisdiction at Title 26, section 7442 USC.

Court of Appeals & Supreme Court Jurisdiction at 26 USC 7482.

Supreme Court Jurisdiction at 28 USC 1254, also.

Mandate of Court of Appeals dated July 6, 1982. 90 days (28 USC 2101 (c)) ends on Oct. 4, 1982.

OPINION OF U.S. TAX COURT (T.C. Memo. 1981-19)

FEATHERSTON, Judge: Respondent determined a deficiency in the amount of $509 in petitioner's 1976 Federal income tax. the Issues for decision are:

1. Whether petitioner is entitled to deduct expenses attributable to the use of his home office; and

2. Whether petitioner is entitled to deduct such expenses as an adjustment to gross income.

FINDINGS OF FACT

Petitioner Paul W. Cousino was a legal resident of Sterling Heights, Michigan, when he filed his Federal income tax return for 1976.

During 1976, petitioner was employed as a junior high school social studies teacher by the Utica, Michigan, school system. During this same period, petitioner also served on the Board of Trustees for Macomb County Community College. Petitioner, who was elected to his latter position, received no compensation for his services. The board held regular monthly meetings as well as many special meetings on one of two campuses.

Petitioner's position as a trustee at the college was unrelated to his employment as a junior high school teacher.

During 1976, petitioner was required by the terms of his teaching employment contract to be at school for over 7 hours. While at school, petitioner was assigned a classroom containing shelves, a filing cabinet, and a desk where he could sit and work. In addition, petitioner had access to a vacant office in the school. This office contained a telephone and was generally available to teachers and visiting specialists, such as the school psychologist.

Petitioner lived in a mobile home during the year in issue. Although not required by his employment contract, petitioner apportioned part of the space of his home as an office. He used the office in connection with his teaching position to prepare lessons, communicate with parents, and grade papers. Petitioner also used his home office for his duties as a trustee such as answering and making telephone calls, reading correspondence, and preparing for board meetings. The office contained a television set.

On his 1976 Federal income tax return, petitioner claimed various expenses, including those attributable to his home office, as an adjustment to gross income. He based the amount of the home office deductions upon the percentage of the mobile home that the office comprised. In his notice of deficiency, respondent disallowed the deductions to the extent they were attributable to petitioner's home office.

OPINION

Congress enacted section 280A to limit the deductions for expenses of an office in the home. Effective for taxable years beginning after December 31, 1975, that section provides the general rule that "no deduction otherwise allowable under this chapter shll be allowed with respect to the use of a dwelling unit which is used by the taxpayer during the taxable year as a residence." Sec. 280A (a). An exception to this rule, however, is set out in section 280A (c) (1) as follows:

(1)Certain business use. — Subsection (a) shall not apply to any item to the extent such item is allocable to a portion of the dwelling unit which is exclusively used on a regular basis—

(A) as the taxpayer's principal place of business,

(B) as a place of business which is used by patients, clients, or customers in meeting or dealing with the taxpayer in the normal course of his trade or business, or

(c) in the case of a separate structure which is not attached to the dwelling unit, in connection with the taxpayer's trade or business.

In the case of an employee, the preceding sentence shall only apply if the exclusive use referred to in the preceding sentence is for the convenience of his employer.

Petitioner first argues that he used his home office in connection with his duties as a junior high school teacher. For petitioner to be entitled to a home office deduction, he must show that his office was exclusively used on a regular basis for one of the three purposes enumerated in section 280A (c) (1). Moreover, because petitioner was an employee, he must show also that the use of the office was for the convenience of his employer. We hold that petitioner fails to qualify for the home office deducton under these requirements.

It is clear that the home office was not a separate structure from his dwelling unit. Sec. 280A (c) (1) (C). It is also clear that

petitioner's principal place of business was the school where he taught rather than his home office. Sec. 280A (c) (1) (A). Petitioner was provided with his own classroom as well as access to another office at the school. Further, petitioner's emplyment contract required his presence at the school for over 7 hours a day.

Petitioner contends that he met the requirements of section 280 (c) (1) (B) on the theory that the office was used by "clients * ** in *** dealing with the taxpayer in the normal course of *** business." Petitioner argues that students used the office because their papers were graded there. Petitioner also argues that parents used the office facilities for communication with petitioner.

We do not agree that the office was used by clients. Merely because petitioner graded papers at his office does not mean that his students thereby used the office to deal with petitioner. To the contrary, it was petitioner, and not the students, who used the office. Similarly, petitioner's use of the office to telephone parents does not constitute use of the office by petitioner's clients within the meaning of section 280 A (C) (1) (B). Therefore, petitioner is not entitled to a deduction for the use

of his home office for his teaching duties.

Petitioner also argues that his home office expenses are deductible because of his use of the office for his activities as a member of the Board of Trustees of Macomb County Community College. Respondent, to the contrary, contends that petitioner's trustee activities do not constitute a trade or business. Respondent observes that petitioner was aware that State law prohibited compensating board members for their services. Thus, he concludes that petitioner's activities as a trustee cannot be characterized as a trade or business because petitioner did not intend to profit from those activities.

Generally, an activity engaged in without an expectation of profit is not considered a trade or business. See Hirsch v. Commissioner, 315 F2d 731, 736 (9th Cir. 1963), affg. a Memorandum Opinion of this Court; Kurkjian v. Commissioner, 65 T.C. 862, 867 (1976). However, "(t)he term 'trade or business' includes the performance of the functions of a public office" even though a profit motive does not exist. Sec. 7701 (a) (26). See Frank v. U.S., 577 F2d 93, 95 (9th Cir. 1978).

The board of trustees of each community college district in Michigan was empowered by statute to, among other things, buy and sell property, borrow funds, issue bonds, and levy taxes. See Mich. Stat. Ann. secs. 15.615(1101) —15.615(1145) (1979). Although it appears to us that petitioner's activities as a member of the board of trustees constituted the performance of the functions of public office within the meaning of section 7701 (a) (26), see Green v. Bookwalter, 207 F Supp 866 (W.D. Mo. 1962), affd. 319 F2d 631 (8th Cir. 1963), we do not decide that issue. Assuming, arguendo that petitioner's trustee duties constituted a trade or business, and further assuming that the requirements of section 280A (c) (1) were met with regard to those trustee duties, petitioner nevertheless is not entitled to a home office expense deduction.

Under section 280A (c) (5), the amount of a deduction for the qualified business use of a home office is limited to the extent that the gross income derived from that use exceeds the deductions which are allowable regardless of whether the home was used for business purposes. Petitioner derived no income from his

trustee activities. Consequently, the home office deduction to which petitioner is entitled equals zero.

Petitioner finally argues that he is entitled to a deduction under section 280A (c) (3) because part of the expenses for his home office were attributable to payments for rental of the space where he kept his mobile home. That exception, however, applies only where the taxpayer rents his dwelling unit or a portion thereof to another person. It does not provide an exception to the general rule of section 280A merely because the taxpayer is a lessee. See sec. 280A (e).

To reflect the foregoing, Decision will be entered for the respondent.

OPINION OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT - filed May 26, 1982 and issued as mandate on July 6, 1982

BEFORE: KENNEDY and CONTIE, Circuit Judges; and TAYLOR, District Judge

(published at 679 F2d 604)

This appeal has been referred to a panel of the Court pursuant to Rule 9(a), Rules of the Sixth Circuit. After examination of the briefs and record, this panel agrees unanimously

that oral argument is not needed. Rule 34(a), Federal Rules of Appellate Procedure.

The petitioner has wholly failed to present any arguable support for his claim that his expenses incurred for maintaining or operating his home office are deductible under the circumstances of this case. As a junior high school teacher, the petitioner is required to spend in excess of seven hours a day at the school. He has his own classroom and he has access to an office equipped with a telephone. Given these uncontroverted facts, is is apparent that the petitioner is not entitled to a deduction under 26 USC 280A (c) (1) (A), (B) or (C) because petitioner has not established that he used the home office for the convenience of the school. Primarily relying on 280A (c) (1) (B) on appeal as authorization for the deduction of his home office expenses, petitioner argues that his students use the home office as he grades their papers, prepares their lessons and talks to their parents on the telephone from the home office. Petitioner, however, has failed to allege that any of his students or their parents have ever visited his home office for any sort of meeting or

for any dealing with himself in the normal course of his business as a junior high school teacher. Petitioner's argument is simply contradicted by common logic and is unsupported by any case law authority.

Petitioner's claim for the deduction of expenses incurred for his work in his home office as a trustee is also frivolous because he did not receive any income for his services as a trustee. Although the term "trade" or "business" includes the performance of the functions of public office under 26 USC 7701 (26), the amount of a qualified deduction for the use of a home office is limited to the extent that gross income derived from that use exceeds the deductions which are allowable regardless of whether the home was used for business purposes. 26 USC 280A (c) (5). Since the petitioner admits that he did not derive any income from the services he performed as a trustee, his deduction is equal to zero. Druker v. Commissioner, 77 USTC 867, 874 (1981); Gestrich v. Commissioner, 74 USTC 525, 530 (1980). There is also no logic or reason to accept petitioner's salary received as a teacher as income which he also received for his services rendered as a trustee.

It is, accordingly, ORDERED that the

Tax Court's judgment dismissing petitioner's suit seeking a redetermination of his income taxes be and hereby is affirmed pursuant to Rule 9 (d) 3, Rules of the Sixth Circuit, because the questions on which the cause depends are so unsubstantial as not to need further argument.

*

(A motion for rehearing was made, since the opinion was silent on the question, raised in briefs, of "Can IRS and the Court's enforce regulations which have been withdrawn and which are un-funded?)

*

ORDER (denying re-hearing) entered by the SIXTH CIRCUIT (KENNEDY, CONTIE and TAYLOR)

Upon receipt and consideration of a petition for rehearing in the above styled case, and

The panel having noted that appellant has brought to our attention nothing substantial raised in his original brief that we did not carefully consider before issuance of this court's order,

Now, therefore, the motion for rehearing is hereby denied.

IT IS SO ORDERED

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CLERK

No. 82-568

In the Supreme Court of the United States

OCTOBER TERM, 1982

PAUL W. COUSIND, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-568

PAUL W. COUSINO, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

In this federal income tax case, petitioner seeks review of the decision below that Section 280A of the Internal Revenue Code of 1954 (26 U.S.C.) precluded him from deducting expenses allocable to the portion of his residence used as an office.

The pertinent facts may be summarized as follows: During 1976, petitioner was employed as a junior high school teacher. Under his employment contract, he was required to spend a minimum of seven hours a day at school. He had his own classroom and access to a vacant school office equipped with a telephone (Pet. App. 9-10). During the same period, petitioner also served without compensation as an elected member on the board of trustees of a local community college. The board held regular monthly meetings as well as special meetings on either of two campuses

(Pet. App. 9). Petitioner's position as a trustee at the college was unrelated to his employment as a teacher (Pet. App. 10).

Petitioner lived in a mobile home during the year in issue. Although it was not required by his employment, petitioner used part of his home as an office to prepare lessons, to communicate over the telephone with parents of his students, and to grade papers. He also used his home office for some of his duties as a trustee, such as answering and making telephone calls, reading correspondence, and preparing for board meetings (Pet. App. 10).

On his 1976 federal income tax return, petitioner deducted expenses attributable to the portion of his home that he used as an office. On audit, the Commissioner of Internal Revenue disallowed the deductions on the ground that the expenses did not come within any of the statutory exceptions to Section 280A(a), which generally prohibits deductions for expenses attributable to a taxpayer's use of a portion of his personal residence for business purposes (Pet. App. 11).[1] The Tax Court upheld the Commissioner's

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[1]Section 280A read, in pertinent part, for the taxable year ended December 31, 1976 as follows:

> SEC. 280A. [as amended by Section 601(a), Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1529] DISALLOWANCE OF CERTAIN EXPENSES IN CONNECTION WITH BUSINESS USE OF HOME, RENTAL OF VACATION HOMES, ETC.
>
> (a) *General Rule.* — Except as otherwise provided in this section, in the case of a taxpayer who is an individual or an electing small business corporation, no deduction otherwise allowable under this chapter shall be allowed with respect to the use of a dwelling unit which is used by the taxpayer during the taxable year as a residence.
>
> (b) *Exception for Interest, Taxes, Casualty Losses, Etc.* — Subsection (a) shall not apply to any deduction allowable to the taxpayer without regard to its connection with his trade or business (or with his income-producing activity).

disallowance of the claimed deductions (Pet. App. 11-16), and the court of appeals affirmed (Pet. App. 16-19).

Petitioner's sole contention (Pet. I) is that the Commissioner disallowed his home office expense deductions pursuant to "a non-existent set of regulations" and that, in so doing, he improperly expended funds "for an activity unfunded by Congress." There is no basis for that contention. Although proposed regulations promulgated under Section 280A (Proposed Treasury Regulations on Income Tax, Section 1.280A-2(b)(2), 45 Fed. Reg. 52399, 52403 (1980)) were subsequently withdrawn by the Treasury after questions concerning their scope had been raised by members of the Congress, the withdrawal of those proposed regulations did not affect the Commissioner's authority to disallow petitioner's claimed deductions. Indeed, the record is clear that in disallowing the deductions in the statutory notice of deficiency (R. 10)[2] and in defending that disallowance in the courts below, the principal authority on which

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(c) *Exceptions for Certain Business or Rental Use; Limitation on Deductions for Such Use.* —

(1) *Certain business use.* —Subsection (a) shall not apply to any item to the extent such item is allocable to a portion of the dwelling unit which is exclusively used on a regular basis —

(A) as the taxpayer's principal place of business,

(B) as a place of business which is used by patients, clients, or customers in meeting or dealing with the taxpayer in the normal course of his trade or business, or

(C) in the case of a separate structure which is not attached to the dwelling unit, in connection with the taxpayer's trade or business.

In the case of an employee, the preceding sentence shall apply only if the exclusive use referred to in the preceding sentence is for the convenience of his employer.

[2] "R." refers to petitioner's record appendix in the court of appeals.

the Commissioner relied was Section 280A(a) of the Code itself. The proposed regulations were simply a preliminary administrative interpretation of Section 280A and added nothing to the responsibility Congress already had imposed upon the Commissioner under the statute. Cf. *Manhattan General Equipment Co.* v. *Commissioner*, 297 U.S. 129, 134-135 (1936). Thus, the cases upon which petitioner relies (Pet. 3-6), which hold that the executive branch may not spend money for activities not funded by Congress, have no bearing on this case.

Moreover, the Treasury withdrew the proposed regulations for reasons altogether unrelated to the grounds upon which petitioner's deductions were disallowed. Petitioner's principal contention in seeking to avoid the general prohibition of Section 280A(a) was that, inasmuch as he used his home office on a regular basis for grading his students' papers, preparing their lessons, and talking to their parents on the telephone, his home office represented a regular place of business and therefore his expenses were deductible under the exception set forth in Section 280A(c)(1)(B).[3] The proposed regulations were withdrawn because of questions raised in the Congress with regard to certain provisions concerning vacation homes and rental of property to relatives arising under subsections 280A(a), (e) and (g). Some members of Congress were also concerned that the proposed regulations contradicted the Tax Court's decision in *Curphey* v. *Commissioner*, 73 T.C. 766 (1980), appeal dismissed, No. 80-7678 (9th Cir. Feb. 22, 1982), that, for purposes of Section 280A(c)(1)(A), a taxpayer engaged in more than one trade or business may have more than one

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[3]The courts below properly rejected that contention because petitioner presented no evidence that he regularly met with clients or customers in his home office in the normal course of his trade or business.

principal place of business.[4] Since this case did not involve vacation homes or rental of property to relatives and since petitioner never claimed that he had more than one trade or business for purposes of Section 280A(c)(1)(A), the Treasury's decision to withdraw the proposed regulations has no relevance to this case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

NOVEMBER 1982

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[4]The Tax Court's decision in *Curphey* accorded with the interpretation of the statute advanced by some members of the Congress. Section 280A(c)(1)(A) was eventually amended to codify the decision in *Curphey*. See Black Lung Benefits Revenue Act of 1981, Pub. L. No. 97-119, Section 113(c), 95 Stat. 1642.